UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAMONS GASKET COMPANY,
A DIVISION OF TRIMAS CORP.,
Employer,

and

16-RD-1597

MICHAEL E. LOPEZ,
Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO,
Union.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), as *amicus curiae*, submits this brief addressing the questions raised by the National Labor Relation Board's Notice and Invitation to File Briefs in *Lamons Gasket Co.*, 16-RD-1597 (Aug. 31, 2010), concerning the Board's voluntary recognition election bar rules. The AFL-CIO is a federation of 57 national and international labor organizations with a total membership of approximately 11.5 million working men and women. For the reasons stated below, we urge the Board to overrule its decision in *Dana Corp.*, 351 NLRB 434 (2007), and return to the voluntary recognition bar rules that were in place prior to that decision.

INTRODUCTION

From the time of its decision in *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966), until 2007, the Board applied the rule that where a union's bargaining status is "established as a result of voluntary recognition of a majority representative . . . the parties must be afforded a reasonable time to bargain to execute the contracts resulting from such bargains." *See Sound Contractors Assoc.*, 162 NLRB 364 (1966). Under the Board's long-standing rule, challenges to the union's representative status were barred during this "reasonable time to bargain." *Seattle Mariners*, 335 NLRB 563 (2001); *MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999). In applying this rule, the Board made clear that only a "*good-faith* recognition of a union by the employer based on an *unassisted* and *uncoerced* showing of interest from a majority of unit employees" would bar challenges to the union's representative status. *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844, 846 (1996) (emphasis added).

The Board recognized a limited exception to the voluntary recognition election bar in certain situations where two rival unions were competing for employee support prior to recognition. In general, "voluntary recognition of a union by the employer . . . w[ould] bar a petition by a competing union," just as it barred any other challenge to a voluntarily-recognized union's representative status. *Smith's Food*, 320 NLRB at 846. However, in order to "ensure that a union capable of filing a petition at the time of recognition is not denied the opportunity for an election because it underestimated a competing union's support, or it simply arrived at the Board's office a little too late," the Board held that where a rival union "demonstrate[d] a 30-percent showing of interest that

predates the recognition" no voluntary recognition bar would apply. *Ibid.* (emphasis added).

In *Dana Corp.*, 351 NLRB 434 (2007), the Board swept aside its longstanding voluntary recognition election bar rule and announced that:

> "no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed. The requisite showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition." *Id.* at 434 (footnote omitted).

To implement its *Dana* decision, the Board promulgated a standard notice to be posted by employers who voluntarily recognize a union. *See* Form NLRB-5518 (10-07) ("*Dana* notice"). This notice states:

> "• On (insert date), your Employer . . . recognized the . . . Union . . . as the unit employees' exclusive bargaining representative based on evidence indicating that a majority of employees in the . . . bargaining unit desire its representation . . . .
>
> "• All employees, including those who previously signed cards in support of the Union, have the right to a secret ballot election conducted by the National Labor Relations Board to determine whether a majority of the voting employees wish to

be represented by the Union, another union or by no union at all . . . .

"• Within **45** days from the date of the posting of this notice, a decertification petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board for a secret-ballot election to determine whether or not unit employees wish to be represented by the Union. Within the same 45-day period, a representation petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board to determine whether or not unit employees wish to be represented by another union." *Ibid.* (bolded and underlined in original).

As explained below, the *Dana* post-voluntary recognition open period and the required *Dana* notice significantly interfere with the freedom of the majority of employees to choose their bargaining representative and with that representative's ability to establish a stable collective bargaining relationship with the employer. The Board should thus overrule *Dana Corp.*, including its notice-posting requirement, and return to its pre-*Dana* voluntary recognition election bar rule.

ARGUMENT

The *Dana* Board asserted that the voluntary recognition election bar rule represented a zero-sum contest between two allegedly "competing interests under the National Labor Relations Act: 'protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.'" 351 NLRB at 434 (quoting *MV Transportation*, 337 NLRB 770 (2002)). This is a false dichotomy. In fact, the voluntary recognition bar *promotes* two fundamental purposes of the NLRA: (1) the

freedom of employees "to bargain collectively through [a] representative[]" that is "designated or selected . . . by the majority of the employees," 29 U.S.C. §§ 157, 159(a); and (2) the elimination of "industrial strife and unrest" by "encouraging . . . collective bargaining." 29 U.S.C. § 151. Because the voluntary recognition bar fulfills both fundamental purposes of the Act, the Board should overrule *Dana* and return to its pre-*Dana* voluntary recognition election bar rule.

A. The voluntary recognition bar effectuates the statutory right of employees to choose their own bargaining representative by guaranteeing that a majority-designated union will have a reasonable time to bargain with the employer in an effort to achieve a collective bargaining agreement. The *Dana* rule allows a minority of employees who oppose union representation to use NLRB procedures to disrupt bargaining and thereby frustrate the majority's choice of a collective bargaining representative.

The Act provides specific guidance about employee free choice in the context of collective bargaining: "Employees . . . have the right . . . to bargain collectively through representatives of their own choosing," as well as "the right to refrain from . . . such activities." 29 U.S.C. § 157. Where a union is "designated or selected for the purposes of collective bargaining by *the majority* of the employees," the selected union "shall be the exclusive representative of *all* the employees . . . for the purposes of collective bargaining." 29 U.S.C. § 159(a) (emphasis added). Thus, while "[t]he workman is free . . . to vote against representation[,] . . . the majority rules." *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944).

The Senate Report on the Wagner Act explained the basis for Congress's decision

to adopt a system of majority representation in the NLRA:

> "Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remain divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conductive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions." S. Rep. No. 74-573, at 13 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 2300, 2313 (1949).

Congress's decision to codify a system of majority representation in the NLRA means that in any given unionized workplace there will possibly be "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of workers." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954); *see also Seattle Mariners*, 335 NLRB at 565 ("In any organizing drive that culminates in . . . voluntary recognition of the union, it is likely that a minority of employees do not favor representation."). The possibility of a *minority* of employees who oppose union representation therefore is a corollary of providing for *majority* choice regarding representation. Thus, the existence of such a minority does not in any way indicate that the bargaining representative

designated by the majority lacks authority or legitimacy. Given the NLRA's system of majority choice, "it would be anomalous to deprive th[e] majority of their expressed desire for representation based merely on the contrary opinion of a minority group of employees." *Seattle Mariners*, 335 NLRB at 565.

The pre-*Dana* voluntary recognition bar furthered the exercise of employee free choice by "ensur[ing] that the bargaining representative chosen by a *majority* of employees ha[d] the opportunity to engage in bargaining to obtain a contract on the employees' behalf without interruption" by a *minority* of employees who oppose the union. *MGM Grand*, 329 NLRB at 466. As the pre-*Dana* Board observed, without such insulation from collateral attack, the NLRA's guarantee of the majority's right "to select a bargaining representative would . . . be meaningless," *ibid.*, since a vocal minority of employees could thwart the collective bargaining process through rear-guard procedural maneuvers.

Although the *Dana* Board acknowledged that "[v]oluntary recognition . . . is undisputedly lawful under [the National Labor Relation Act]," 351 NLRB at 436 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595-600 (1969)), it unwarrantedly granted a minority of employees opposed to union representation an opportunity to frustrate the choice of the majority. That is because the *Dana* rule permits a minority of employees who failed to persuade their co-workers of their anti-union position *prior* to voluntary recognition to file a decertification petition *after* recognition without showing that the union, in fact, lacks majority support. The *Dana* rule thus "defeat[s] the very objective that it seeks to achieve – giving effect to the employees' freely expressed designation of a

union as their representative." *Smith's Food*, 320 NLRB at 846.

The *Dana* notice posting requirement is especially destructive of the statutory rights of the majority of employees to select a "representative[] of their own choosing." 29 U.S.C. §157. By stating that "[a]ll employees, including those who previously signed cards in support of the Union, have the right to a secret ballot election" if "[w]ithin **45** days from the date of the posting of th[e] notice, a decertification petition . . . [is] filed," Form NLRB-5518 (bolded and underlined in original), the *Dana* notice *encourages* rear-guard attacks on a majority-supported union by the minority of employees who are opposed to union representation, even if that minority has no realistic possibility of achieving majority support for its position.

The *Dana* Board disingenuously states that the voluntary recognition notice "does not encourage . . . the filing of a petition . . . [since] [t]hat is a matter left to employees." 351 NLRB at 442. But this statement ignores the fact that *Dana* requires the employer to post a notice that literally invites employees to file election petitions. This invitation to reconsider the employees' decision regarding union representation is unique in the NLRA law. Non-unionized employers are not required to post a notice with boldfaced and underlined instructions telling employees how to obtain a representation election, nor are unionized employers required to post a notice informing employees of the open period that precedes the expiration of a collective bargaining agreement.

The *Dana* Board suggests that the notice posting is necessary to allow employees "an opportunity . . . to discuss and weigh the pros and cons of choosing collective bargaining representation." 351 NLRB at 442. Yet, this assumes that employees did not

already consider such matters before deciding whether to sign a union petition or authorization card. *Cf. Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 132 (1982) ("Board rules . . . must be based on a view of employees as mature individuals."). No one would seriously suggest that if thirty percent of employees voted "No" in a Board election, the election would need to be run again in order to provide employees more time "to . . . weigh the pros and cons of choosing collective bargaining representation," since such a rule would be anathema to democratic principles of majority rule. But that is what *Dana* requires whenever a majority-supported union achieves recognition through a voluntary-recognition process.

B. In addition to promoting the free choice of the majority of employees to designate a bargaining representative, the voluntary recognition election bar furthers the National Labor Relations Act's purpose of achieving industrial peace by encouraging stable collective bargaining relationships. The *Dana* rule, in contrast, injects significant delay and uncertainty into the embryonic relationship between the employer and the newly-recognized union.

The NLRA seeks to foster stable collective bargaining relationships between employers and unions in order to "make appropriate collective action of employees an instrument of peace rather than of strife." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937). "Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management," *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981), in order to "provid[e] for the orderly resolution of labor disputes between workers and employers,"

Auciello Iron Works v. NLRB, 517 U.S. 781, 785 (1996), so as to achieve "industrial peace." *Brooks*, 348 U.S. at 103 .

The primary mechanism for "promoti[ng] . . . collective bargaining" to achieve "industrial peace" is the mutual obligation of the employer and the union to bargain in good faith. *See* 29 U.S.C. § 158(d). "The object of th[e] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). To this end, "[i]t is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining." *Id.* at 107-08.

In its role as "referee [of] the process of collective bargaining," the Board has long promulgated and enforced election bar rules necessary to "permit unions to develop stable bargaining relationships with employers:"

> "In essence, the[] [Board's election bar rules] enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. The presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees. The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." *Fall River Dyeing & Finishing*

Corp. v. NLRB, 482 U.S. 27, 38-39 (1987) (internal citations omitted).

In other words, "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944). That is so because:

> "It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent." *Brooks*, 348 U.S. at 100.

Conversely, "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out." *Ibid.*

The Board's pre-*Dana* voluntary recognition bar rule, which permitted the parties a reasonable period following recognition to bargain a first contract, reflected the statutory purpose of "promoti[ng] . . . collective bargaining as a method of defusing and channeling conflict between labor and management." *First Nat'l Maint. Corp.*, 452 U.S. at 674. As the Board explained, "requiring an election any time there is a considerable minority of employees that opposes union representation would abrogate the 'long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations.'" *Seattle Mariners*, 335 NLRB at 565 (quoting *MGM Grand*

Hotel, 329 NLRB 464, 466 (1999)). That is because permitting an election "disrupts the nascent relationship between the employer and the lawfully recognized union pending the outcome of an election and any subsequent election proceedings" and "may entail a significant delay." *Smith's Food*, 320 NLRB at 845-46.[1]

The *Dana* Board acknowledged as much, admitting that "the basic justifications for providing an insulated period to promote labor-relations stability during the infancy of a collective-bargaining relationship are well-founded." 351 NLRB at 441. Nevertheless, the *Dana* Board insisted that these "basic justifications for . . . an insulated period . . . during the infancy of a collective-bargaining relationship . . . do not warrant *immediate* imposition of an election bar following voluntary recognition," implausibly suggesting that where an election petition is filed during the 45-day window period, the union "should not be deterred from promptly engaging in meaningful bargaining simply because of the risk of losing that majority in an election." *Id.* at 441-42 (emphasis in original).

---

[1] The Board's experience implementing *Dana* supports the common-sense observation that the *Dana* rule serves to significantly delay the commencement of collective bargaining. *Dana* permits the filing of election petitions "within 45 days of the [posting of] the [voluntary recognition] notice," 351 NLRB at 434, as opposed to within 45 days of the voluntary recognition itself. Board statistics reveal that the average time between the date when an employer informs the Board that a voluntary recognition has occurred and the date when a notice is posted is almost 18 days. *See* NLRB, Post Dana Corp. Case Processing, available at http://www.nlrb.gov/research/frequently_requested_documents.aspx (last checked Oct. 27, 2010). This means that, on average, the voluntary recognition bar does not begin until at least 63 days after voluntary recognition. In addition, because the Board does not calculate the length of time between when the voluntary recognition occurs and when the employer first contacts the Board, it is likely that the actual delay is even longer.

Contrary to the *Dana* Board's arguments, "significant delay" in the commencement of bargaining is the likely result of the *Dana* rule and that delay obviously works a severe hardship on the collective bargaining process. The Board's case law recognizes that the requirement of prompt bargaining – "the mutual obligation . . . *to meet at reasonable times* and confer in good faith with respect to wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d) (emphasis added) – is critical to fostering good faith bargaining and reducing industrial strife. *See, e.g., Regency Serv. Carts, Inc.*, 345 NLRB 671, 673 (2005) ("[D]ilatory tactics . . . constitute violations of [the] obligation to bargain in good faith."). That is so because an employer's duty to bargain "is the making effective of the duty of management to extend recognition to the union; the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 484-85 (1960).

The requirement of *prompt* bargaining as an administrative mechanism to encourage good faith bargaining is reflected in the election bar rules the Board applies in the incumbent union context. Pursuant to the contract bar doctrine, decertification and rival union petitions may only be filed during a 30-day open period that occurs between 90 days and 60 days prior to the contract termination date or after the contract has expired. *Leonard Wholesale Meats*, 136 NLRB 1000 (1962). This 30-day open period is followed by a 60 day "insulated period" when no election petitions may be filed. *Ibid.* The purpose of this insulated period is to allow the parties to negotiate free from the "threat of overhanging rivalry and uncertainty," *Deluxe Metal Furniture Co.*, 121 NLRB

995, 1001 (1958), while simultaneously encouraging the parties to make every effort to reach a new agreement before the old contract expires.

Common sense indicates – and Board precedents confirm – that initial contract negotiations between an employer and a newly-recognized union require *more*, not less, insulation from "rivalry and uncertainty" than bargaining between an incumbent union and an employer. For example, in negotiating an initial contract, the parties must "establish[] initial procedures, rights, wage scales, and benefits," a process that "may take time that is not required in those instances where a bargaining relationship has been established over a period of years." *MGM Grand*, 329 NLRB at 466 (internal quotation marks omitted). Yet, the *Dana* rule – including especially *Dana*'s notice-posting requirement – invites challenges to the legitimacy of the newly-established bargaining relationship at the very moment when insulation from "rivalry and uncertainty" is most needed to allow the collective bargaining process to succeed. The *Dana* rule thus operates contrary to the NLRA's fundamental purpose of securing industrial peace through the encouragement of collective bargaining.

C. Because the voluntary recognition bar effectuates the fundamental purposes of the NLRA of ensuring the freedom of employees to choose their own bargaining representative and of encouraging industrial peace through collective bargaining, the Board should return to its pre-*Dana* voluntary recognition bar rule, *Keller Plastics*, 157 NLRB at 587; *Sound Contractors*, 162 NLRB at 365, and eliminate the *Dana* notice-posting requirement. For the same reasons, the Board should revive the limited exception to the voluntary recognition rule that the pre-*Dana* Board applied to rival union petitions.

Smith's Food, 320 NLRB at 846.

CONCLUSION

The Board should overrule *Dana Corp.* and return to its pre-*Dana* voluntary recognition election bar rule.

Respectfully submitted,

/s/Lynn K. Rhinehart
James B. Coppess
Matthew J. Ginsburg
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5336

CERTIFICATE OF SERVICE

I hereby certify that, on November 1, 2010, I caused to be served a copy of the foregoing Brief by email on the following:

Keith E. White, ESQ.
Barnes & Thornburg LLP
600 One Summit Square
Fort Wayne, IN 46802
260-425-4770
Keith.white@btlaw.com

Glenn M. Taubman ESQ.
National Right to Work Legal Defense Fund
8001 Braddock Road, Suite 600
Springfield, VA 22160
703-321-8510
gmt@nrtw.org

Richard J. Brean
United Steelworkers AFL-CIO
Five Gateway Center, Suite 807
Pittsburgh, PA 15222
412-562-2549
rbrean@usw.org

NLRB Region 16 – Ft. Worth
819 Taylor Street, Room 8A24
Ft. Worth, TX 76102
817-978-2921
Nlrbregion16@nlrb.gov

/s/Lynn K. Rhinehart